In the Supreme Court of the United States

October Term, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO, and FRANK J. VANEK,

Petitioners,

v.

JOHN R. NOVOTNY,

Respondent.

Brief in Opposition

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QUESTIONS PRESENTED

1. Whether individuals who conspire to deprive others of federal rights and privileges can avoid liability by acting as members of the Board of Directors of a corporation.

2. Whether a conspiracy to deprive others of rights and privileges accorded them under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, may be the subject of an action under 42 U.S.C. §1985 (3).

3. Whether Congress has the constitutional authority to make illegal a conspiracy to deprive a class of persons of rights and privileges accorded to the class under commerce clause-based statutory law.

REASONS FOR NOT GRANTING THE WRIT

1. **While The Decision Below May Conflict With The Decisions Of Other Courts Of Appeals As To The Existence Of A Conspiracy For Purposes Of 42 U.S.C. §1985(3), The Decision Below In This Case Is The Correct Decision And Should Not Be Disturbed.**

Despite the fact that there is no support at all for their position in the language or history of 42 U.S.C. §1985(3), Petitioners contend that individuals who conspire to deprive others of rights and privileges of the laws are immune from liability for the harm they have done if they conspire in their capacities as corporate directors of a single corporation.

While Respondent concedes that the Third Circuit has decided this issue differently than other courts of appeals, Respondent also suggests that the Third Circuit is correct and those courts are wrong to the extent they have decided the matter differently. It seems to Respondent too clear for serious argument that when individuals conspire to violate a federal statute, it is irrelevant that they do so on behalf of a corporation.

Respondent contends that the cases which Petitioners cite to support their position are based entirely on faulty reasoning and proceed from a logic which suits the field of antitrust but should find no home in civil rights law.

In the leading case, *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) a criminal lawyer who was refused office rental by a real estate corporation brought an action under §1985(3) claiming that the denial was based on the race and alienage of his clientele. The Seventh Circuit, reviewing the dismissal of his claim, held that an act of arbitrary business discrimination by a corporate landlord did not fall within the proscriptions of §1985(3) where it was a single business entity, although it represented the collective judgment of several individuals (three individual defendants), 459 F.2d at 196. *Dombrowski* has been cited with approval and followed in the Second Circuit in *Girard v. 94th Street and Fifth Avenue Corp.*, 530 F.2d 66 (2nd Cir. 1975) (assignee of lease charging cooperative apartment corporation with conspiring to discriminate on the basis of sex). The Fourth Circuit reached a similar result independently, *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504, 507-08 (4th Cir. 1974) (Boreman, J., concurring) (Ku Klux Klan member charging corporate employer with conspiracy to discharge).

Respondent contends, however, that the rationale of *Dombrowski* is faulty for the simple reason that the purposes underlying the proscriptions of antitrust law are substantially different than those supported by the civil rights acts.

Whereas two or more corporate officers or employees acting on behalf of a *single* business entity cannot accomplish the harm to be prevented by antitrust conspiracy law unless they involve another competing business entity, two or more corporate officers or employees acting on behalf of a single business entity *can* accomplish the harms to be prevented by civil rights law *without* involving another business entity.

A review of then Judge—now Justice—Stevens' opinion in *Dombrowski* must surely show its fallacy. Its antitrust conspiracy principles should no more be transplanted to civil rights law than they should be to criminal law. Cf. 18 U.S.C. §317; *U.S. v. Griffin*, 401 F.Supp. 1222 (D.C. Ind. 1975).

Respondent contends that *Dombrowski* must be narrowly circumscribed if it is to be accepted at all, but suggests that even its narrow holding is unsupported by logic or law. Judge Stevens' language in *Dombrowski* is, appropriately, quite tentative, and inconsistent:

> The conduct proscribed by the section is that of "two or more persons." In this case three persons were involved in the discriminatory act... Since only one firm was involved, and both Brennan and Dowling acted within the scope of their authority as agents for that firm, it is open to question whether the conspiracy requirement of §1985(3) has been met.
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> We...believe that the statutory requirement that "two or more persons...conspire to go in disguise on the highway" is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm. We do not suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding. Agents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon. But if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this Statute. Cf. *Morrison v. California*, 291 U.S. 82, 92, 54 S. Ct. 281, 78 L.Ed. 664. In this case we believe the evidence fails to

establish this element of a §1985(3) violation. 459 F.2d at 193, 196.

The concept of "business entity" discrimination created by Judge Stevens is completely and absolutely irrelevant to 42 U.S.C. §1985(3), which speaks in terms of "persons." There is not a single iota of support in §1985(3) for the proposition that individuals may insulate themselves from responsibility by conspiring as part of a "single business entity."

While Judge Stevens makes a brief and unexplained reference to the Ku Klux Klan, the logical extension of the *Dombrowski* decision is exactly that individual Klan members may escape the proscription of §1985(3) by incorporating or otherwise forming themselves into a single business entity.

The logic in this area of case law spawned by *Dombrowski* is filled with non-sequiturs. Analogy is usually attempted between §1985(3) and anti-trust cases, with *Nelson Radio and Supply Co. v. Motorola*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925, 73 S. Ct. 783, 97 L.Ed 1356 (1953), frequently cited. Cf. *Johnson v. Baker*, 445 F.2d at 427. Although *Nelson Radio* did hold that a corporation, as a single entity, could not conspire with itself, that case must be read in the context of the antitrust laws. The purpose of the antitrust laws is to promote competition among business entities: a business entity cannot conspire with itself where it cannot compete with itself. Where competition may be restrained within the corporate structure, however, as with affiliated or vertically integrated corporations, such structure will not immunize the corporation from the antitrust laws. *United States v. Yellow Cab Co.*, 322 U.S. 218, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947). As the Supreme Court of the United States warned in the *Yellow Cab* case, "the affiliation [of corporations] is assertedly one of the means of effectuating the illegal conspiracy not to compete." 322 U.S. at 229.

The Third Circuit has also noted that "common ownership or control of corporations does not insulate them from the antitrust laws," citing exceptions to the general rules. *Johnson v. Baker*, 445 F.2d at 427. The purpose of §1985(3) is to prohibit invidious conspiracies among individuals directed toward deprivation of constitutionally-protected rights. It is at the very first level of analysis (the legislative purpose) that the antitrust-civil rights analogy breaks down. For most antitrust violations under the Sherman Act conspiracy proscription, the corporation is considered as an individual which has conspired with another corporation. For civil rights purposes, each individual member of the corporation is capable of violating §1985(3) with any other individual or individuals.

Where the courts are willing to superimpose the business entity to bar a §1985(3) claim, they create an artificial immunity which favors form over substance. May future conspirators, acting with the exact intent meant to be curtailed by §1985(3), immunize their activity by forming corporations?

The *Dombrowski* decision itself foreshadowed the limits of its logic and specifically noted that its holding would not extend to all corporate activity. 459 F.2d at 193. It warned that members of the Klan could not successfully defend acts of violence on the basis that they were merely agents of the Grand Dragon. But, could those very same members, sitting on corporate boards of banks or real estate agencies, effect policies of employment discrimination or discrimination in housing by performing their functions as acts of collective business judgment?

There is absolutely no statutory or decisional support for the assertion that a single act of discrimination by officers or employees of a single business entity is outside the traditional concepts of conspiracy. The case cited by Judge Stevens in *Dombrowski*, *Morrison v. California*, involved

convictions of two individuals for conspiracy to violate the California Alien Land Law. On the page of that decision referenced by the *Dombrowski* court, the California court discusses the nature of conspiracy and the fact that it is impossible in the nature of things for a man to conspire with himself. The quantum leap from *Morrison* to *Dombrowski* is a difficult one to accept absent any bridge of support. The *Morrison* court is obviously talking about natural persons in a criminal indictment. *Morrison* contains not one iota of support for *Dombrowski's* startling and otherwise unsupported "business entity" proposition.

The reasoning of Judge Meskill in *Girard v. 94th Street and Fifth Avenue Corporation*, supra, is equally conclusory and devoid of rational basis.

Following *Dombrowski*, Judge Meskill asserts:

> Here there is but one single business entity with a managerial policy implemented by the one governing board, while at the University of Pennsylvania, each department had its own disparate responsibilities and functions so that the actions complained of by the plaintiff were clearly not actions of only one policy making body but of several bodies; thus the court correctly held that the allegations supported a claim of conspiracy among them. Here plaintiff's allegations of multiple acts by the directors are not alleged to be other than the implementation of a single policy by a single policy making body. 530 F.2d 66 at p. 71.

Respondent suggests, however, that the very nature of a conspiracy requires a "single policy" upon which the conspirators agree. Otherwise it would not be a conspiracy. *U.S. v. Butler*, 494 F.2d 1246 (10th Cir. 1974); *U.S. v. Kates*, 508 F.2d 308 (3rd Cir. 1975). Obviously, therefore, the fact that a "single policy" is arrived at is no reason to deny the existence of a conspiracy.

Respondent maintains that anti-trust principles of conspiracy are unique to that field and exist because of the limited business purposes of the anti-trust statutes, and that those principles should not be engrafted onto general conspiracy law in fields not specifically related to business enterprise.

The particular aim of the anti-trust conspiracy prohibition is set forth in cases such as *Nelson Radio and Supply Co. v. Motorola*, 200 F.2d 911 (5th Cir. 1952), in which Circuit Judge Borah noted, inter alia, at page 914:

> Surely discussions among those engaged in the management, direction and control of a corporation concerning the price at which the corporation will sell its goods, the quantity it will produce, the type of customers or market to be served or the quality of goods to be produced do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act...
>
> The Act does not purport to cover a conspiracy which consists merely in the fact that the officers of the single defendant corporation did their day to day jobs in formulating and carrying out its managerial policy. The defendant is a corporate person and as such it can act only through its officers and representatives. It has the right as a single manufacturer to select its customers and to refuse to sell its goods to any one for any or no reason whatsoever. It does not violate the Act when it exercises it rights through its officers and agents, which is the only medium through which it can possibly act.

In other words, the officers and directors cannot be guilty of conspiring to do that which the corporation "as a *single* manufacturer" had the right to do in the conduct of its business. The analysis derives not from ascertaining the nature of a conspiracy, but solely from the business nature of the acts performed and decision made. The officers and

directors are not guilty of conspiracy not because they didn't "conspire," but because what they conspired to do was not illegal; that is, the harm to be prevented could not be accomplished by a single business entity.

As stated in *U.S. v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 C.Fd. 992 (1919):

> The purpose of the Sherman Act is...to preserve the right of freedom of trade. 250 U.S. at 307.

and as the 5th Circuit has recognized,

> It is fundamental that at least two independent *business entities* are required for violation of Section 1...*Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 at 484 (emphasis added).

In the civil rights field, however, a single business entity *can* accomplish the discrimination or other civil rights harm to be protected against. The individual corporate officers are, by conspiring, capable of committing all of the acts contemplated under §1985(3).

Anti-trust conspiracy principles, therefore, should not be permitted to operate as one exception to normal conspiracy principles in the civil rights field. Natural persons *can* conspire, whether as corporate officers of a single business entity or not and there is absolutely no reason in law or logic why their corporate or business positions should insulate them when their conspiracies result in deprivations of civil rights.

Accordingly, Respondent urges this court to deny the petition of Great American Federal and the individual Petitioners on the ground that the Third Circuit Court of Appeals was correct in its apparently unanimous refusal to follow *Dombrowski v. Dowling*.

2. While The Decision Of The Third Circuit In The Instant Case May Conflict With The Decision Of The Fourth Circuit In *Doski v. Goldseker*, The Third Circuit's Decision Is The Correct One And Should Not Be Disturbed.

The basic premise underlying the position of Petitioners and the opinion in *Doski v. Goldseker*, 539 F.2d 1326 (4th Cir. 1976), must be that in the area of employment discrimination Title VII protects against all harms covered by §1985(3). Since, as the Third Circuit recognized, Title VII did not specifically repeal §1985(3), it could only be repealed by implication, and it can only be repealed by implication if Title VII makes 1985(3) superfluous. Petitioner recognizes that Title VII did not nullify any previously enjoyed substantive rights, but the real question is whether or not §1985(3) provides a remedy for a harm which Title VII does not provide.

One such harm, consistently recognized by law as particularly insidious, is the conspiracy. Conspiracies to engage in unlawful acts have traditionally been punished separately, and often more severely, from the unlawful acts themselves. *Clune v. U.S.*, 159 U.S. 590, 40 L.Ed. 269 (1895). Section 1985(3) would also be particularly useful where, as in the instant case, the persons conspiring may not fall within the definition of "employers" in the meaning of Title VII, §701, and may, therefore, not be subject to Title VII's proscriptions. Cf. *Foust v. Transamerica Corp.*, 391 F.Supp. 312 (D.C. Cal. 1975).

Respondent relies, in general, upon the reasoning of the Third Circuit's opinion in this matter beginning at page 36a of the Petition, but also points out that Petitioners' assertion of the consequences to flow from that opinion are unsupported by evidence.

Title VII's "emphasis on conciliation and administrative resolution" is not likely to be undermined at all since it is not practical to assume that many plaintiffs will proceed against individuals of questionable solvency without first exhausting Title VII remedies against a solvent business organization. Even if the business organization could be made liable for the conspiratorial acts of its agents, Petitioner has not suggested why complainants would bring their claims piecemeal or why they would be less willing to conciliate. Complainants might, no doubt, have another weapon in their arsenals in the event conciliation broke down, but why Complainants should have to negotiate from positions of less advantage Petitioners do not hint.

The fact that a plaintiff may have the benefit of a longer statute of limitations does not seem unfair in light of the fact that the action involves proof of a conspiracy—universally recognized as difficult to discover and prove because it frequently encompasses elements of concealment.

That actions under §1985(3) may involve a jury trial may be an advantage for a plaintiff—but only if one assumes that juries are more sympathetic to the claims of civil rights plaintiffs than judges, a proposition not supported by anything before the court.

If punitive damages can be awarded, it may be that plaintiffs have been successful in proving conspiracies characterized by intentional or perhaps malicious discriminations, in which case the policies to be served by §1985(3) are in fact served. The same argument can be made with regard to any elements of damage—including unlimited back pay—which may be awarded under §1985(3). Title VII recognizes that a compensable discrimination may not be intentional. *Boston Chapter NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. den.* 421 U.S. 910, 43 L.Ed.2d 775, 95 S.Ct. 1561; *Muller v. United States Steel Corp.*, 509 F.2d

923 (10th Cir. 1975), *cert. den.* 423 U.S. 825, 46 L.Ed.2d 41, 96 S.Ct. 39. Accordingly, it is not surprising that the damage provisions of Title VII are not punitive in nature.

Under §1985(3), plaintiffs must show that the conspiracy had as its purpose the invidious discrimination complained of. *Core v. Clemmons*, 323 F.2d 54 (5th Cir. 1963), *cert. den.* 375 U.S. 992, 11 L.Ed.2d 478, 84 S.Ct. 632. If such a purposeful discrimination is shown, who can say that a heavier penalty is not justified? Further, who can assume that a plaintiff will bypass the administrative process and opt for a significantly more difficult burden of proof? Such suggestions by Petitioners in the instant case, therefore, are unsubstantiated in fact, law or experience and dire predictions of open floodgates are simply insufficient to justify a review of the Third Circuit's opinion in the instant case.

3. The Decision Below Does Not Conflict With Any Statutory Analysis Developed By This Court.

The essence of the decision of the Third Circuit in that portion of its opinion beginning on page 42a of the Petition is simply that if Congress has the constitutional authority to enact a statute, it must, *ipso facto*, have the constitutional authority to prohibit with appropriate sanction a conspiracy to violate that statute. It is not necessary that the statute prohibiting the conspiracy have an independent constitutional base. Petitioners impliedly recognize this legal fact, but argue that the Third Circuit "never examined §1985(3) to determine whether Congress intended it to be such a statute." Respondent contends that the court did in fact examine §1985(3) and correctly found it to be such a statute.

As part of their argument, Petitioners claim—falsely, Respondent believes—that the Third Circuit's decision means that "a plaintiff can state a Title VII-based cause of action under §1985(3) against a corporate employer even

though that employer fails to meet the jurisdictional standards of Title VII because it does not sufficiently affect interstate commerce." Petitioners suggest that as a result, two or more agents of a corporation who conspire to deprive an employee of Title VII rights would be liable under §1985(3) even if the corporation had fewer than 15 employees. Exactly how employees of such a corporation would have Title VII rights in the first place, however, is not explained by Petitioners. Respondent would suggest that they wouldn't. If Congress has the power to regulate interstate commerce, and if a corporation with fewer than 15 employees does not, presumably, affect interstate commerce, then Congress has no power to outlaw discrimination in corporations with fewer than 15 employees. If Congress cannot outlaw such discrimination, it seems that employees of such corporations have no Title VII rights or privileges and it further seems that no conspiracy can be entered into to deprive them thereof.

The result which Petitioners call, on page 13 of their Petition, "unconstitutional" and "irrational" is exactly that, but it is reached by Petitioners, not by the Third Circuit.

Even if, however, §1985(3) is not the kind of statute which prohibits a conspiracy to violate any federal statute, §1985(3) is *clearly* the kind of statute which prohibits a conspiracy to violate an anti-discrimination statute such as Title VII. The opinion of this court in *Griffin v. Breckenridge*, 403 U.S. 88, quoting Representative Shellabarger, undoubtedly supports the proposition that in §1985(3) Congress intended to prevent "deprivations which shall attack the equality of rights of American citizens... and the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights...." 403 U.S. at 100.

In Title VII, Congress chose the commerce clause as a means of assuring equality of employment opportunity, at least to those persons employed by or seeking employment in business and other entities affecting interstate commerce. To the extent that Title VII is violated, persons are deprived of equality of rights as contrasted with other citizens' rights. Obviously, such a deprivation was within the power of Congress to prohibit and was almost certainly the kind of deprivation Congress could deal with through any of its other powers. The expansive language used by Schellabarger and quoted in *Griffin* also makes it clear that Congress intended to reach rights which might be created by Congress or the Constitution in the future and there is nothing from which it can be concluded that Congress intended to limit the effect of §1985(3) only to those rights then codified.

The "jurisdictional limitations" which Petitioners look for on page 13 of their petition are obviously contained in Title VII, and Respondent contends that Petitioners are wrong in asserting that the *Griffin* analysis requires §1985(3) itself to have a commerce clause foundation in order to remedy the violation of a commerce clause-based right—especially a right whose affinity for the §1985(3) motivation is so close.

CONCLUSION

For all of the foregoing reasons, respondents urge this Court to deny Petitioners' request for a review of the decision of the Third Circuit in the instant case.

Respectfully submitted,

FELDSTEIN GRINBERG
STEIN & McKEE

By _____
Jay Harris Feldstein, Esquire

CERTIFICATE OF SERVICE

The undersigner hereby certifies that on this 28th day of November, 1978, three copies of the within BRIEF IN OPPOSITION were mailed, postage prepaid, to John A. Wayman, Eugene K. Connors and Walter A. Bleil, c/o Reed Smith Shaw & McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania 15219, Counsel for Petitioners, and that three copies were mailed postage prepaid to Douglas S. McDowell, c/o McGuiness & Williams, 1747 Pennsylvania Avenue, N.W., Washington, D.C. 20006, Counsel for *Amicus* Equal Employment Advisory Council. I further certify that all parties required to be served have been served.

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